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SUPREME COURT GRANTED DISCRETIONARY REVIEW:
JUNE 17, 2009
(FILE NO. 2009-SC-000143-DG)

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000181-MR

WANDA COMBS

APPELLANT

v. APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK FLETCHER, JUDGE
ACTION NO. 07-CR-00064

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** *

BEFORE: STUMBO AND THOMPSON, JUDGES; GUIDUGLI,¹ SENIOR
JUDGE.

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

GUIDUGLI, SENIOR JUDGE: A jury found Wanda Combs guilty of trafficking in a controlled substance, first degree, and she was sentenced to serve eight years in prison. She brings two issues to our attention on appeal. First, she argues that she was not given notice of the charge against her when the trial court allowed the Commonwealth to amend the indictment and still submit alternative instructions to the jury. Second, she contends that a witness was improperly allowed to provide character evidence. After our review of the record, we believe that the trial court erred in submitting alternative instructions to the jury. Therefore, we reverse the judgment and remand this matter for a new trial.

Combs was originally indicted by the Breathitt County grand jury on a single count of trafficking in a controlled substance in the first degree. Combs was driving a vehicle when she encountered a cooperating informant on the street. Debbie Bach was a passenger in the vehicle. Contact with the cooperating informant was made on the driver's side of the vehicle. Although the entire transaction was secretly videotaped, the transaction was not clearly visible on the videotape and it is impossible to identify the passenger from the videotape. There is a short moment where the passenger is seen handling the money. The cooperating informant testified that he gave the money to Combs and received the controlled substance from her.

On the morning of trial, the Commonwealth filed a motion to amend the indictment to charge Combs with complicity to trafficking in a controlled substance, first degree. Combs objected. She argued that no other person had been

charged and that in order to be guilty of complicity, she must have aided some other person who committed the actual trafficking. The Commonwealth responded that the complicity statutes do not require the conviction of another person for the primary offense. Combs then argued that none of the discovery mentioned another person that Combs may have aided. The Commonwealth responded that it had just discovered the identity of the passenger - Debbie Bach - and suggested there was no undue prejudice because Combs had all of the information available to her, including the videotape of the transaction. After Combs asked if Bach had entered into a plea bargain with the Commonwealth, the Commonwealth stated there was no deal. The trial court then ordered the matter to proceed to trial that morning.

The trial court asked the Commonwealth which indictment should be read to the jury; the Commonwealth asked for the complicity indictment. Combs informed the trial court she was not ready to defend herself against the new charge of complicity. But the trial court ordered the trial to begin. The trial court read the indictment to the jury panel and stated that Combs was charged with “complicity by aiding and counseling Debbie Bach in the selling of Oxycontin.” After the jury was selected, the trial court read the indictment to the jury but this time informed them that Combs was charged with “complicity by aiding or attempting to aid Debbie Bach to sell Oxycontin.”

During *voir dire*, Combs informed the jury that the Commonwealth had the burden of proving Bach trafficked in a controlled substance. The Commonwealth objected to this statement, which the trial court sustained. During

the Commonwealth's opening statement, the jury was told that it would find Combs "aided Ms. Bach." During Combs's opening statement, she told the jury that Bach sold the pills and took the money.

A detective testified that Gary Parks was a cooperating witness who said he could purchase Oxycontin from Combs. He testified that Parks was searched before making contact with Combs and did not have any drugs on his person. When he returned from meeting with Combs, he had Oxycontin in his possession. Parks did not know the name of the passenger in the vehicle. The detective testified that he was not able to discern from the videotape which person in the car supplied the Oxycontin, nor was he able to determine which person received the money. On cross-examination, Combs asked the detective whether Parks had been charged with criminal conduct himself. The answer indicated that Parks was not working for the police in order to secure more favorable treatment for any crime he may have committed. Combs then asked if Parks was a paid informant, and the answer implied that he was.

Parks testified that he worked as a cooperating witness and was paid for every drug transaction he could arrange. He told a detective that he could buy drugs from Combs, and the deal was arranged. Combs objected when Parks was asked why he worked for the police as an informant, but the trial court overruled the objection. Parks then responded that his son was addicted to drugs and had eventually shot himself. After verifying that the videotape fairly and accurately depicted the occurrence, Parks testified, "I paid them \$100 when I purchased from

Combs and the other lady.” Parks testified that he was not sure if Combs gave the money to “the other lady” or not and he was not sure if “the other lady” supplied Combs with the pills.

Another detective testified that police did not know Bach’s name until a few days prior to Combs’s trial. During his testimony before the grand jury, he did not mention anyone else except Combs. He acknowledged that he had charged Bach the day of the start of Combs’s trial with trafficking in a controlled substance after finally learning her identity.

The Commonwealth rested its case in chief, and Combs moved for a directed verdict based on the argument that the Commonwealth had not proven any action by any principal and Combs could not be guilty of complicity absent an act from someone else. Since there was no proof offered that Bach trafficked in drugs, Combs could not be guilty of aiding Bach. The motion was denied. Combs then called Bach and one other witness to testify on her behalf. Both refused to testify based on advice of counsel and pursuant to the Fifth Amendment of the United States Constitution. Combs then rested, and the Commonwealth elected not to call any rebuttal witnesses. Combs renewed her motion for a directed verdict, which was again denied.

The Commonwealth tendered two alternative instructions. The first instructed the jury on the elements of finding Combs guilty of trafficking in a controlled substance and the second instruction authorized a verdict based on the complicity charge. Combs objected and stated that the only authorized verdict,

based on the amended indictment, was for complicity. The court submitted both instructions to the jury, and the jury ultimately found Combs guilty of the trafficking charge.

A recent case from the Supreme Court of Kentucky examining this issue of amending the indictment involved charges of assault and robbery. *See Fields v. Commonwealth*, 219 S.W.3d 742 (Ky. 2007). At the close of the evidence from both sides, the Commonwealth moved to amend the indictment to include complicity to commit assault and robbery. *Id.* at 746. The Supreme Court relied on Kentucky Rules of Criminal Procedure (RCr) 6.16, which permits the trial court to amend an indictment any time before a verdict has been returned. *Fields*, 219 S.W.3d at 747. The Supreme Court reiterated its decision in *Commonwealth v. McKenzie*, 214 S.W.3d 306 (Ky. 2007), that modifying an indictment to include a charge of complicity does not constitute charging an additional or different offense.

The essential question, however, when examining any “variance between the indictment and the proof is whether the defendant in fact had fair notice and a fair trial.” *Johnson v. Commonwealth*, 864 S.W.2d 266, 272 (Ky. 1993). In *Wolbrecht v. Commonwealth*, 955 S.W.2d 533 (Ky. 1997), the original indictment charged complicity and named one of three defendants as the triggerman. Mid-trial, the Commonwealth amended the indictment to open the potential triggerman to be almost anyone. The Court held it was error because the

defendants were prepared to defend against complicity with a specific set of persons, not some unidentified person. “Our case law provides that an indictment may be amended at any time to conform to the proof providing the substantial rights of the defendant are not prejudiced and no additional evidence is required to amend the offense.” *Id.* at 537. A defendant must have “reasonable certainty about the charge[.]” *Id.* “[A] defendant has the right to rely on the fact that he would only have to rebut evidence of which he was given notice.” *Id.*

Here, the Commonwealth’s theory of its case against Combs changed on the morning of trial. She went from being a principal to one who aided Bach. Pursuant to *Fields*, modification of the indictment to change it from Combs being charged as a principal to being charged in complicity was not error. Due to the amendment, Combs defended herself based on the complicity charge. “[T]o convict a defendant of guilt by complicity, the jury must find beyond a reasonable doubt that the offense was, in fact, committed by the person being aided or abetted by the defendant.” *Parks v. Commonwealth*, 192 S.W.3d 318, 327 (Ky. 2006). “[T]he Commonwealth has the burden of proving the commission of the charged offense by another person and of proving that the defendant participated in that offense.” *Harper v. Commonwealth*, 43 S.W.3d 261 (Ky. 2001).

The trial court may permit an indictment to be amended any time before a verdict “if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.” RCr 6.16. When the trial court allowed the amendment to complicity, it placed the burden on the Commonwealth

to present its case based on Combs aiding another; presumably in this situation, Bach.

When the Commonwealth was permitted to pursue both charges after the evidence was closed and the jury was to be instructed, Combs had no opportunity to defend herself against the original charge (trafficking) and was substantially prejudiced. Combs was never permitted the opportunity to defend herself as a principal because she was not charged as a principal once the indictment was amended. The trial court erred by submitting instructions permitting a guilty verdict as a principal.

In order to possibly prevent further questions on a re-trial of this case, we will address Combs's other argument that while testifying, Parks was impermissibly allowed to present what Combs terms "character evidence." There was no error. During the cross-examination of one of the detectives, Combs asked whether Parks had been charged with a crime or if Parks was paid as an informant. This brought Parks's credibility into issue. Once Combs opened the door with that line of questioning, the Commonwealth was permitted to ask Parks to clarify why he acted as an informant.

For the reasons stated regarding the amendment of the indictment and the submission of alternative instructions, the judgment of the Breathitt Circuit Court is reversed and this matter is remanded for a new trial.

ALL CONCUR.

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